LAWYERS

Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

ROBERT CORN-REVERE
DIRECT (202) 508-6625
bobcornrevere@dwt.com

SUITE 450
1500 K STREET NW
WASHINGTON, D.C. 20005-1262

TEL (202) 508-6600
FAX (202) 508-6699
www.dwt.com

November 5, 2003

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication: CS Docket No. 98-120

Dear Ms. Dortch:

In recent *ex parte* presentations in this proceeding,[1] the Association for Public Television Stations, the Corporation for Public Broadcasting, and The Public Broadcasting Service (collectively, the "Public Broadcasters") asked the Commission to reverse its prior determination that the must carry requirement for a broadcaster's "primary video" signal requires carriage of only one programming stream along with program-related content, even if the broadcaster uses its digital allotment to multicast several program offerings.[2] In the instant filing, A&E Television Networks ("AETN") and Courtroom Television Network LLC ("Court TV"), by their counsel, urge the Commission to reaffirm its definition of "primary video" as set forth in the *Digital Must Carry Order*. AETN and Court TV also urge the Commission (i) to reject any suggestion that it use content-based distinctions in adopting or applying its must carry rules, (ii) to reaffirm that the purpose of the must carry rules is not to stimulate the digital transition, and (iii) to again reject the "either/or" proposal allowing broadcasters to choose between requiring cable carriage of either their analog or digital television signals during the DTV transition.

---

[1] *See Ex Parte* filings by the Public Broadcasters in CS Docket No. 98-120, sent to (1) Chairman Michael Powell, dated September 10, 2003, (2) Ms. Marlene H. Dortch, Esq., dated September 11, 2003, and (3) Jane Mago, dated September 17, 2003.

[2] *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd. 2598, 2622 (2001) ("*Digital Must Carry Order*") ("'primary video' means a single programming stream and other program-related content").

1. The Commission's "primary video" definition fully comports with the plain language of the Act and with its statutory and factual context.

An examination of the plain language of Section 615 of the Communications Act of 1934 fails to support the Public Broadcasters' arguments that the Commission's *Digital Must Carry Order* misinterprets the phrase "primary video." *See* Public Broadcasters' September 10, 2003 filing at 1-3. Public Broadcasters again challenge the Commission's reading of the Act, arguing that "primary video" refers to a number of channels, rather than just one. Contrary to their analysis of the statutory language, however, this is a straightforward exercise in statutory interpretation. The Communications Act does not use the phrase "primary video" in a vacuum. Rather, the relevant statutory language refers to "the primary video … of each of the local commercial television stations carried on the cable system…" 47 U.S.C. § 534 (b)(3). In this context, "video" can be read only as a singular noun, since it refers to the video carrier of a television station whose signal is carried by a cable system.

Had Congress intended a broader definition of "primary," it would have clearly specified its intentions. *See Ex Parte* letter of Bloomberg Television and TechTV, LLC in CS Docket No. 98-120, filed October 23, 2003 ("Bloomberg/Tech TV *Ex Parte*") at 4-5. Rather, by using the word "primary" to precede "video," Congress recognized that broadcasters may choose to offer additional or ancillary video content, but the only content that could potentially merit statutory must carry protection is a station's primary, free, over-the-air broadcast channel receivable within its market. Unlike the Public Broadcasters' example of "primary evidence," which refers to an amorphous body of information which almost always can be read in the plural as in the singular, the context of the Act indicates that "video" is intended in its singular form, referring to a specific video stream of a television station, not to a package of programming.

The Public Broadcasters also are incorrect in citing 1 U.S.C. § 1 to support reconsideration of the Commission's "primary video" definition. That provision could not possibly mean that every singular term in federal law is to be read as being plural, especially in a case, such as this one, where inferring such a meaning would significantly alter congressional intent and infringe on First Amendment rights. *See Motion Picture Association of America v. FCC,* 309 F.3d 796 (D.C. Cir. 2002). (FCC cannot interpret particular provisions of Communications Act in ways that conflict with the rest of the Act, particularly in matters that involve programming). Significantly, the Public Broadcasters' quotation of this provision omits the key statutory caveat "*unless the context indicates otherwise*." 1 U.S.C. § 1 (emphasis added). As discussed above, the context of "primary video" in this provision of the Communications Act of 1934 strongly indicates that the term refers to only one video transmission stream.

2. Defining "primary video" as a single video stream is consistent with copyright law.

The Public Broadcasters also err in suggesting that the Commission's "primary video" definition is somehow at odds with the compulsory copyright license granted to cable operators in Section 111 of the Copyright Act, 17 U.S.C. § 111. Their position appears to be that there must be symmetry between the breadth of the Commission's must carry rules and the cable compulsory license in Section 111, and that interpreting "primary video" to be a single stream would somehow compromise that symmetry.

However, precise symmetry between the must carry and cable copyright rules is not required by the Copyright Act and has not existed since the FCC deleted distant signal carriage and syndicated exclusivity rules in 1980, thereby allowing cable operators to carry the signals of any broadcast stations that their customers wanted them to carry. *See Malrite TV of New York v. FCC,* 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Before then, the compulsory copyright license required payments by cable operators which were premised on carriage rules as they existed when the Copyright Act was enacted in 1976, at which time FCC rules limited the number of distant broadcast stations that a cable system could carry. After those rules were eliminated, the copyright rates were adjusted in an effort to roughly compensate copyright holders for the changed circumstances resulting from the modifications to the Commission's signal carriage rules. *See Adjustment of the Royalty Rate for Cable Systems,* 47 FR 52146 (Nov. 19, 1982).

If copyright consistency is in fact a legitimate concern, then the Public Broadcasters' remedy would be to commence a proceeding before the Copyright Office as anticipated by 17 U.S.C. § 801(b)(2)(B), asking a Copyright Arbitration Royalty Panel to find that a cable operator's voluntary carriage of more of a television station's video streams than just the primary video entitles the copyright holders to additional compensation. Ample precedent exists for such adjustments to copyright fees, and a Copyright Office proceeding presents a far more appropriate forum for addressing the Public Broadcasters' copyright concerns than the instant FCC proceeding. *See, e.g., Adjustment of the Syndicated Exclusivity Surcharge,* 55 FR 33604 (August 16, 1990) (revising copyright rates to reflect FCC's re-adoption of syndicated exclusivity rules).

Public Broadcasters similarly are incorrect in arguing that the Commission's "primary video" interpretation would interfere with the compulsory license's prohibition against altering a broadcaster's signal. *See* Public Broadcasters' September 10, 2003 filing at 4. That prohibition applies to the content of a single programming stream, preventing a cable operator from altering programming content or removing commercials. It was not intended to cover a scenario where a cable operator simply chooses not to carry a separate and unaltered programming stream. Moreover, if this were an issue, it is one for the Copyright Office, and not the Commission, to address.

3. <u>The "primary video" definition does not diminish the technological flexibility the Commission has afforded to broadcasters.</u>

Public Broadcasters also continue in their mistaken arguments in claiming that the "primary video" definition contradicts the Commission's policy of encouraging technological flexibility. *See* Public Broadcasters' September 10, 2003 filing at 4-5. To the contrary, at the broadcast industry's own request, the Commission has previously afforded broadcasters an unprecedented degree of flexibility to use their digital allotment for most any purpose. *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd. 12809, 12820-23 (1997). Having received maximum flexibility in using their digital allotment, and after having been given this spectrum for free to begin with, broadcasters should not now be heard to argue that granting mandatory carriage only to their primary video stream constitutes an impermissible limitation of this flexibility. Broadcasters should not be permitted to bootstrap their freedom from DTV regulation into an excuse to protect their programming channels at the expense of others, or worse, into an excuse to regulate others. Such a result would not promote "flexibility." To the contrary, requiring cable carriage of multiple multicast channels would severely limit a cable operator's flexibility to choose the programming that it wishes to provide, contrary to the First Amendment rights of cable operators and affected cable programmers. Such a result may serve the broadcasters' narrow interests in developing and distributing a range of new program offerings that are not related to their respective over-the-air "primary video" signals, but it would not serve the public interest.

4. Content issues can play no role in the Commission's decision.

Several of the Public Broadcaster's *ex parte* filings suggest that the programming content of non-commercial television stations somehow gives the Commission the obligation or the authority to treat that programming differently than the programming of commercial television stations, for purposes of whether to require cable carriage of a broadcaster's multicast signals.[3] Similarly, a recent *ex parte* filing by Paxson Communications Corporation again suggests that the Commission should rely on broadcast content as a reason to expand broadcasters' must carry rights to include multiple channels. Paxson claims that "increasing the amount and diversity of over-the-air broadcast content" and "increasing the amount of local and public affairs programming available free over-the-air" should be significant factors in the Commission's decision in this proceeding. *Ex Parte* letter of Paxson Communications Corporation in CS Docket No. 98-120, filed October 1, 2003 , p. 5. *See also Ex Parte* letter of DIC Entertainment Corporation in CS Docket 98-120, filed November 4, 2003 (arguing that success of new children's network is contingent on multicast must carry).

In this proceeding there is no need to take issue with the broadcasters' claims regarding the value of their programming. Nor is there any purpose to comparing the relative merits of broadcast

[3] *See* Public Broadcasters' September 11, 2003 filing at 3 (discussing the "governmental interest in preserving public television") and Public Broadcasters' September 17, 2003 filing (describing the types of programming that Public Broadcasters may provide using their multicast channels).

versus cable programming. Obviously, AETN, Court TV, The History Channel, and other cable networks easily could provide numerous examples of the public affairs and educational programs that they provide, as well. But such matters are beside the point in any proceeding to determine mandatory carriage rights, because the First Amendment denies government authority to award regulatory favors based upon its estimation of the value of the speech involved. Accordingly, there is absolutely no constitutional justification for the Commission to make distinctions in its must carry rules based on programming content, nor is there any basis for treating non-commercial broadcasters any differently from commercial broadcasters in this regard.

The United States Court of Appeals for the D. C. Circuit has made quite clear that the perceived value of public broadcasting cannot justify preferential regulation that favors noncommercial broadcasters. Consequently, any attempt to base FCC policy on the value of Public Broadcasters' programming would be unconstitutional. *Action for Children's Television v. FCC*, 58 F.3d 654, 668-669 (D.C. Cir. 1995). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 681 (1994) ("*Turner I")* (O'Connor, J., concurring in part and dissenting in part) (cable programming networks have "as much claim as PBS to being educational or related to public affairs"). As the Public Broadcasters themselves recently observed in the broadcast flag proceeding, their programming should not be treated any differently than other broadcast programming, since by so doing "the Commission would be unnecessarily injecting content analysis into what should be a content-neutral rule." The Public Broadcasters further explained that such a distinction "would create severe administrative burdens, as the Commission would be called upon to review and adjudicate whether to classify certain types of programming as protected or exempt" from the rule. *Ex Parte* letter of Public Broadcasters in MB Docket No. 02-230, filed October 8, 2003, p. 2 (discussing broadcast flag proceeding). The identical arguments would hold true here in this context as well.

The Supreme Court undoubtedly would invalidate any digital must carry or multicast requirements predicated on the presumed value of the favored programming. Indeed, the Court only narrowly upheld single-channel analog must carry based on the assumption by a bare majority of the Justices that those rules were content-neutral. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*"). Four Justices already concluded that analog must carry was content-based and therefore unconstitutional, i*d*. at 229 (O'Connor, J., dissenting), a conclusion that would have been unanimous if the original rules had been predicated on the arguments now put forward by Paxson and the Public Broadcasters. In evaluating analog must carry, the majority expressly disavowed the notion that "Congress regarded broadcast programming as *more* valuable than cable programming," or that "that Congress' purpose in enacting must-carry was to force programming of a 'local' or 'educational' content on cable subscribers." *Turner I*, 512 U.S. at 648 (emphasis in original). But the majority cautioned that "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say." *Id*. at 658. Here, by asking the FCC to adopt multicast must carry as an element of the digital transition in order to promote various new types of broadcast programming, Paxson and the Public Broadcasters

espouse content-based goals that cannot be squared with the *Turner* Court's rationale that "Congress sought to preserve the *existing structure* of the Nation's broadcast television medium." *Id*. at 652. Thus, not even the majority in *Turner* would accept the arguments being advanced in support of multicast carriage.

There even is a serious question whether the Court would continue to support single-channel analog must carry if the case was presented today. As Comcast Corporation recently explained, due to the significant changes that have occurred in the cable and video markets since the Supreme Court's *Turner* decisions, it is very possible that Court would not reach the same conclusions today, and the logic of those decisions cannot be extended to justify multicast or dual must carry requirements. These marketplace changes include the substantial growth of competition to cable service, a decreasing number of homes that rely on over-the-air broadcast service, and the decision to permit one entity to own multiple television stations in a single market. *See Ex Parte* letter of Comcast Corporation in CS Docket No. 98-120, filed October 16, 2003 at 1-3. *See also* Bloomberg/Tech TV *Ex Parte* at 5 (the *Turner C*ourt barely found analog must carry to be constitutional and it is a far different and less defensible constitutional proposition for each digital broadcast station to displace multiple non-broadcast networks, were the Commission to require multicast must carry).

As with every other programmer who must compete in the marketplace, the value of Public Broadcasters' programming ultimately will determine whether or not it is carried. If the programming provided on multicast channels is of high quality and is valued by viewers, then that programming will be carried by cable systems based on merit, just like programming from other broadcast and non-broadcast sources. *See Ex Parte* letter of Comcast Corporation in CS Docket No. 98-120, filed October 17, 2003 at 1 (in recognition of the fact that numerous local public broadcast stations will offer valuable multicast programming, Comcast has reached agreements to carry such programming in every market in which it provides high definition cable service). Absent regulatory intervention, this marketplace dynamic will work efficiently to ensure widespread cable carriage of worthwhile programming. However, no basis exists for defining "primary video" differently for non-commercial broadcasters or to otherwise expand such stations' must carry rights, based on the nature of their programming. Broadcasters should face the same marketplace conditions governing acceptance of their multiple feeds as every other programmer in their efforts to secure cable carriage.

5. The Commission may not support must carry requirements due to its desire to stimulate the digital transition.

The Commission should not look to the must carry rules as a mechanism for stimulating the transition to digital television. As noted above, promoting a new type of broadcast program service was not among the goals Congress set forth for analog must carry. Quite simply, multicast must carry would not advance any of the interests on which the Supreme Court relied in upholding the Commission's analog must carry rules: (1) preserving free over-the-air local

broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition. *Turner II,* 520 U.S. at 189. In addition, granting multicast carriage rights would not materially advance the goal of promoting the digital transition. The Commission, the General Accounting Office ("GAO"), and commenters in this and related proceedings have all explained that a wide variety of factors will play a significant role in the digital transition and that many issues other than digital must carry must first be resolved, before the DTV service can hope to succeed.[4] In light of the numerous factors cited by these parties, must carry should not be looked to as the linchpin of the digital transition; indeed, must carry will play no more than a tangential role in the process.

6. The either/or must carry proposal disserves the Commission's goals and should again be rejected.

Finally, the Commission should reject efforts to resurrect the so-called "either/or" proposal, under which broadcasters could choose between requiring cable carriage of either their analog or digital television signals during the DTV transition. "Either/or" is really just a back door way of requiring dual carriage, which the Commission has already rejected. *See Digital Must Carry Order*, 17 FCC Rcd. at 2605. The relatively low market penetration of digital television receivers would effectively require cable operators to carry *both* a broadcaster's analog and digital signals. This is the case because a broadcaster opting for digital carriage in an either/or regime would know that such a request will also require analog carriage, since the vast majority of cable subscribers who want to view the station would not be able to receive the digital signal.

Finally, pursuing "either/or" as a means of effectuating the DTV transition is also disingenuous, since it would in fact *prolong* that transition by giving broadcasters no incentive to reach the 85% penetration threshold, which is required before a broadcaster must return its analog allotment. Accordingly, either/or would enable broadcasters to retain both their analog and

---

[4] *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1279, 1287, 1314 (2003) (noting the importance of consumer awareness, the widespread consumer availability of DTV equipment, and improved marketing in the digital transition); *Additional Federal Efforts Could Help Advance Digital Television Transition* 23, at 39-40 (November 2002) (public acceptance will perhaps be the most significant hurdle in the DTV transition, suggesting that the Commission must work to increase public awareness of the transition and what it means to consumers, consider strengthened digital-tuner mandates to "prime the pump," and assess the merit of establishing a date-certain for cable systems to switch from analog to digital carriage); Bloomberg/Tech TV *Ex Parte* at 3 (requiring broadcasters to develop high quality digital programming in order to obtain cable carriage, not a government guarantee of carriage regardless of program quality, will motivate consumers to purchase digital television sets). *See also* Comments of Sinclair Broadcasting Group and Consumer Electronics Association in MB Docket No. 03-15.

digital spectrum without encouraging the transition to digital broadcasting, thereby frustrating the Commission's goals. *See* Bloomberg/Tech TV *Ex Parte* at 6-7.

In conclusion, the Commission has been presented with no reason why it should reconsider its determination that a television's "primary video" constitutes a single video stream, for purposes of the must carry rules. Any arguments that the promotion of certain types of programming should play a role in the Commission's decision constitutes an impermissible content-based determination that cannot be defended constitutionally.

Respectfully submitted,

A&E TELEVISION NETWORKS
COURTROOM TELEVISION NETWORK LLC

Robert Corn-Revere /s/
Robert Corn-Revere
James S. Blitz

Davis Wright Tremaine LLP
1500 K Street, N.W., Suite 450
Washington, DC 20005-1272
(202) 508-6600

cc: Chairman Michael Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Jane E. Mago
W. Kenneth Ferree
Rick C. Chessen
Bill Johnson